STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2014
v	No. 314563 Wayne Circuit Court
PHILLIP MCKENZIE PAYNE, a/k/a PHILLIP MACKENZIE PAYNE, Defendant-Appellant.	LC No. 12-003654-FC

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of guilty but mentally ill of second-degree murder, MCL 750.317, and guilty but mentally ill of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 270 to 540 months' imprisonment for the second-degree murder conviction and 24 months' imprisonment for the felony-firearm conviction. For the reasons set forth in this opinion, we affirm.

This appeal arose from the shooting and death of Richard Jennings that occurred on November 30, 2011, on Ferguson Street, a residential street in the city of Detroit. Defendant and Jennings were childhood friends that knew each other for over 20 years, and at one point, lived together on Ferguson Street. In recent years, their relationship was described as "rocky" and a number of witnesses observed defendant and Jennings arguing regularly. Defendant was diagnosed with schizoaffective bipolar disorder in 2001, and was hospitalized over 20 times for his condition in 10 years preceding the shooting. On the day of the shooting, defendant left his grandmother's house and went to Ferguson Street, where Jennings continued to live. Jennings and defendant got into a verbal confrontation on the street concerning marijuana that defendant allegedly stole from Jennings. The verbal altercation escalated and they started to push each other. Jennings then took his coat and shirt off and confronted defendant. As defendant started to walk away, Jennings pushed the back of defendant's head. Defendant pulled a gun out of his coat and shot Jennings twice. Jennings fell to the ground, and according to the testimony of several witnesses, when Jennings sat up and faced defendant, defendant stood over Jennings and fired two more shots, one directly to his face.

Defendant was arrested and charged with first-degree murder, second-degree murder, and felony-firearm. Defendant's trial counsel presented a defense of insanity, claiming that defendant was not criminally responsible for his actions at the time of the shooting due to his mental illness. The jury was instructed on self-defense, mental illness, and legal insanity. Additionally, the jury was instructed on first-degree murder, the lesser charge of second-degree murder, or in the alternative, voluntary manslaughter. The jury found defendant guilty but mentally ill of second-degree murder and guilty but mentally ill of felony-firearm. Defendant now appeals.

Defendant contends that insufficient evidence was presented to support a conviction of guilty but mentally ill of second-degree murder.

This Court reviews a claim of insufficient evidence de novo, "viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Furthermore, "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

Defendant asserts that insufficient evidence was presented to prove the malice element of second-degree murder because the provocation by Jennings coupled with the nature of defendant's mental illness heightened defendant's emotional state and negated malice. A defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following:

> (a) The defendant is guilty beyond a reasonable doubt of an offense.
>
> (b) The defendant has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense.
>
> (c) The defendant has not established by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. [MCL 768.36(1).]

Second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). Malice is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Aldrich*, 246 Mich App at 123, quoting *Mayhew*, 236 Mich App at 125. "The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009), quoting *Mayhew*, 236 Mich App at 125.

In viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a rational trier of fact could find that the prosecution proved the element of malice beyond a reasonable doubt. After Jennings pushed defendant in the back of the head, defendant pulled the gun from his coat and shot Jennings twice. Then, defendant walked up to Jennings, who was sitting on the ground, and shot him two more times, one of which was to the face. Clearly, defendant possessed the intent to kill when he aimed the gun at defendant and shot him four times.[1]

Defendant asserts that even assuming he possessed the intent to kill, the issue remains unanswered as to whether adequate provocation negated the presence of malice. The elements of voluntary manslaughter are included in the elements of murder, and thus, voluntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). In order to prove voluntary manslaughter, "one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions." *Id.* at 535. Provocation is not an element of voluntary manslaughter, but rather, a circumstance that negates the presence of malice, and must have caused a reasonable person to lose control. *Id.*; *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Thus, the provocation must cause a reasonable person to act out of passion rather than reason. *Pouncey*, 437 Mich at 390. Any special traits of the particular defendant cannot be considered, and the fact that the defendant may have had some mental disturbance is not relevant to the question of provocation. *People v Sullivan*, 231 Mich App 510, 519-20; 586 NW2d 578 (1998).

In *Pouncey*, 437 Mich at 389, our Supreme Court stated:

> "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason . . . . One commentator interprets the law as requiring that the defendant's emotions be so intense that they distort the defendant's practical reasoning: 'The law does not excuse actors whose behavior is caused by just any . . . emotional disturbance. . . . Rather, the law asks whether the victim's provoking act aroused the defendant's emotions to such a degree that the choice to refrain from crime became difficult for the defendant. The legal doctrine reflects the philosophical distinction between emotions that only cause choice and emotions so intense that they distort the very process of choosing.'
>
> In addition, the provocation must be adequate, namely, that which would cause the reasonable person to lose control. Not every hot-tempered individual who flies into a rage at the slightest insult can claim manslaughter. The law cannot countenance the loss of self-control; rather, it must encourage people to control their passions. (Internal citations omitted).

[1] Additionally, evidence was presented from forensic psychologist Judith Block who testified that defendant's behavior appeared organized and goal-directed.

A review of the evidence establishes that adequate provocation to shoot Jennings four times did not exist. There is no evidence that defendant was in a highly inflamed state of mind: testimony established that defendant and Jennings got into a verbal argument when Jennings accused defendant of stealing marijuana from him. Testimony further revealed that Jennings and defendant had a very long relationship, most of which involved heated arguments. As witnesses who knew both men testified it was not unusual to come upon them during the course of an argument. On the day of the shooting, testimony revealed that defendant and Jennings got into each other's faces and started to push each other. Jennings then took off his coat and shirt. Defendant turned around to walk away, and Jennings pushed the back of defendant's head. In response, defendant pulled a gun out of his coat and Jennings dared defendant to shoot him. Defendant then shot Jennings twice, which caused him to stumble over and fall down. Then, as previously stated, while Jennings was sitting upright on the ground, defendant walked up to Jennings and shot him two more times, once in the face. Although evidence was presented that Jennings was the first aggressor when he pushed the back of defendant's head while defendant was walking away, this is insufficient to cause a reasonable person to pull out a gun and shoot. With the exception of defendant's testimony, none of the eye witnesses observed Jennings with a weapon.

Additionally, the testimony presented does support a conclusion that defendant's ability to reason was blurred by passion; his emotional state did not reach such a level that he was unable to act deliberately. *Pouncey*, 437 Mich at 389. Even if he was scared and felt provoked, there was sufficient evidence for the jury to conclude that defendant's decision to fire his weapon initially at Jennings, and then two more times after Jennings was on the ground, was a deliberate and reasoned act. Furthermore, the events that transpired on the day of the shooting did not strike any of the witnesses who had known defendant and Jennings as unusual, until defendant resorted to lethal force. Given the totality of the testimony, we cannot conclude that a reasonable person under these circumstances would be provoked into shooting an unarmed individual four times merely because he was pushed from behind. Additionally, the fact that defendant's schizoaffective bipolar disorder may have been triggered from having the back of his head pushed is not relevant to the question of provocation. *Sullivan*, 231 Mich App at 519-20. Therefore, viewing the evidence in the light most favorable to the prosecution, we cannot find that malice was negated by adequate provocation. Accordingly, defendant is not entitled to relief on this issue.

In a Standard 4 brief, defendant next contends that his trial counsel was ineffective for the following reasons: (1) failure to reasonably investigate and call an alibi witness, Jesse Meyers, who would have testified that defendant acted in self-defense; (2) failure to interview the prosecution's expert witness, Dr. Judith Block, which would have disclosed the fact that she was not given the arresting officer's testimony regarding defendant's state of mind at the time of the arrest; (3) failure to meet and interview defendant until a few days before trial; and (4) failure to accept the plea agreement offered by the prosecution before trial.

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. To establish ineffective assistance of counsel, the defendant must show that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Heft*, 299 Mich App 69, 80-81; 829 NW2d 266 (2012). "The defendant was prejudiced if, but for defense counsel's errors, the result of the proceedings would have been different." *Id.* at 81. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A defendant must also overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). A defendant may not attempt to improperly expand the record on appeal, and any attempt to will not be considered by this Court. MCR 7.210(A)(2)[2]; *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

Defendant's contention that his counsel was ineffective for failing to investigate and call Meyers as an alibi witness fails. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Trial counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome. *Id.* at 493. Trial counsel's failure to call a witness is only considered ineffective assistance if it deprived defendant of a substantial defendant, meaning a defense that may have changed the outcome of the case. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

In the instant case, defendant clearly mischaracterizes the nature of an alibi witness. Defendant claims that Meyers would have testified that defendant acted in self-defense. This is not an alibi witness, but instead, a corroborating witness to the events that occurred. Defendant supports his claim regarding the content of Meyers's proposed testimony with an affidavit from Meyers. However, because this affidavit is not part of the lower court record, the content of this affidavit is not considered by this Court, and review is limited to mistakes apparent on the record. *Jordan*, 275 Mich App at 667; *Powell*, 235 Mich App at 561 n 4. Beyond defendant's mere assertions regarding what Meyers would have testified to, defendant provided no proof and thus, he failed to establish a factual predicate for his claim. *Carbin*, 463 Mich at 600. Even assuming Meyers would have testified that defendant acted in self-defense, three other eye witnesses observed defendant shoot Jennings twice while Jennings was already down on the

[2] "In an appeal from a lower court, the record consists of the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced."

ground. Moreover, all the eye witnesses, with exception of defendant, testified that Jennings was unarmed during the whole incident. Thus, even if Meyers's testimony on self-defense was provided, the prosecution presented a number of witnesses that testified that defendant did not act in self-defense in using deadly force. Additionally, it appears that trial counsel's strategy was not focused on self-defense, but rather, an attempt to prove that defendant was legally insane at the time of the offense. Given the number of eyewitnesses to the shooting and their statements to police, this was a reasoned approach. Trial counsel presented two experts that testified regarding defendant's schizoaffective bipolar disorder, and focused on defendant's state of mind at the time of the offense. Therefore, defendant failed to overcome the strong presumption that it was sound trial strategy to emphasize an insanity defense, rather than self-defense. *Sabin*, 242 Mich App at 659.

Defendant's second contention, that he was denied effective assistance of counsel because his trial counsel failed to interview Dr. Block before trial, fails. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The failure to interview witnesses does not alone establish inadequate preparation. *Id.* at 640, 642. Defendant must show "the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.* at 642.

In the instant case, absent from the record is any indication that defendant's trial counsel was ineffective for failing to interview Dr. Block regarding Officer Patrick Hill's police report before trial. In fact, on cross-examination, trial counsel questioned Dr. Block regarding the content of Officer Hill's police report in an attempt to get Dr. Block to admit that her failure to read the report affected her conclusion that defendant was criminally responsible. Trial counsel's questions pointed out the fact that Dr. Block made her determination without reviewing Officer Hill's report, which included a statement made by defendant that, "I have devils in my life that are friends and enemies and I believe that they are trying to steal from me and kill me so I had to kill them first." This questioning on cross-examination tends to suggest that trial counsel's strategy included the use of the information in the police report to discredit Dr. Block's conclusions. Moreover, the failure to interview Dr. Block before trial regarding the police report tends to show the strategy included surprising Dr. Block on the stand with this police report. Therefore, defendant failed to overcome the strong presumption that his trial counsel exercised sound trial strategy in choosing not to question Dr. Block regarding Officer Hill's police report before trial.

Defendant's next contention, that trial counsel was ineffective for failing to meet with and interview defendant until a few days before, trial also fails. Despite defendant's assertion that counsel was unprepared for trial, the record suggests that defendant's trial counsel presented a sufficient defense. Trial counsel presented as a theory the defense of insanity, and did so by calling two expert witnesses, a psychiatric nurse practitioner and psychiatrist, to testify regarding defendant's history of schizoaffective bipolar disorder and his mental condition at the time of the offense. Furthermore, counsel also attempted to point out inconsistencies in the stories of the prosecution's witnesses, and emphasized that defendant was either not the aggressor or that Jennings actions triggered defendant's mental condition, which affected his ability to possess the requisite criminal intent. Therefore, a review of the record suggests that counsel was adequately prepared for trial. Even if defendant's trial counsel failed to meet with defendant until a few

days before trial, defendant also failed to establish that the outcome would have been different. Because defendant bears the burden of establishing the factual predicate for his claim, his mere assertions that an interview earlier in time would have changed the outcome of trial is insufficient to show prejudice. *Carbin*, 463 Mich at 600.

Defendant's last argument, that his trial counsel was ineffective for not seeking a plea deal with the prosecutor, is without merit. A defendant has a Sixth Amendment right to counsel, which extends to the plea-bargaining process. *Lafler v Cooper*, __ US __; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). A trial counsel's assistance must enable the defendant to make an informed and voluntary choice between trial and a guilty plea. *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995). A defendant's trial counsel must explain to the defendant "the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice." *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). "In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S Ct at 1384. Furthermore, in a circumstance in which a defendant rejects a plea offer based on ineffective assistance of counsel:

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. [*Id.* at 1385.]

In the instant case, defendant alleges that a plea deal with a five year sentence agreement was offered before trial, and defendant's trial counsel rejected this offer. However, absent from the record is any indication that a plea offer with a five-year sentence agreement was even made. In fact, at sentencing, defendant's trial counsel indicated that he submitted a sentencing memorandum, which provided that the defendant attempted to plead guilty and accept responsibility at the outset of the matter. Counsel suggested that defendant was willing to accept the 20-year sentence that was in the plea agreement. Thus, a review of the record suggests a plea offer for a five-year sentence was never available. Furthermore, nothing in the record suggests that counsel told defendant to reject a plea offer. Consequently, defendant failed to establish a factual predicate for his claim and prove that counsel's performance fell below an objective standard of reasonableness.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Stephen L. Borrello
/s/ Deborah A. Servitto